

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property at retail. 35 ILCS 120/2 (1998 State Bar Edition). (This is a GIL).

April 26, 2001

Dear Xxxxx:

This letter is in response to your letter dated February 12, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy, and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

AAA is in the business of selling equipment and supplies to its franchised stores for use in the operation of their restaurants. To ensure that AAA is appropriately complying with the sales tax laws in the state of Illinois, AAA respectfully requests a determination regarding the taxability of the items listed on the attached schedule.

On this schedule you will find a listing of the supply and equipment products that AAA sells to its franchisees along with brief descriptions. Please indicate, in the right hand column, whether each item is taxable or exempt, with reference to the applicable sales tax regulation when possible.

If you have any questions, please give me a call.

We are unable to answer your letter in the manner you requested. We hope the following discussions regarding the manner in which the items you listed are taxed is helpful.

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2 (1998 State Bar Edition). The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 (1998 State Bar Edition).

A person who sells items that have commercial value (i. e., value to persons other than the purchasers thereof) incurs Retailers' Occupation Tax (sales tax) liability when making such sales, even if such items are produced on special order for the purchaser. Examples of items having such commercial value would be signs that spell out "real estate", "insurance", "hamburgers" etc. and which do not spell out the name of the purchaser nor the brand name of the purchaser's product and which are not otherwise similarly individualized. Please refer to 86 Ill. Adm. Code 130.2155 Vendors of Signs, enclosed. Such items could also include window decals that are not similarly individualized.

If the sign vendor produces a sign on special order of the customer and the sign is so specialized that it would have no commercial value and could not be sold at substantially the same price to anyone other than the customer who placed the order, the sign vendor would not incur Retailers' Occupation Tax liability. A company that produces special order advertising signs, posters and display units that are so specialized that they have no commercial value and could not be sold at substantially the same price to anyone other than the customer who placed the order likewise would not incur Retailers' Occupation Tax liability. These transactions would be subject to liability under the Service Occupation Tax Act.

Retailers' Occupation Tax and Use Tax do not apply to receipts from sales of personal services. Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred incident to sales of service. For your general information we are enclosing a copy of 86 Ill. Adm. Code 140.101 regarding sales of service and Service Occupation Tax.

The purchase of tangible personal property that is transferred to service customers may result in either Service Occupation Tax liability or Use Tax liability for the servicemen, depending upon which tax base the servicemen choose to calculate their liability. Servicemen may calculate their tax base in one of four ways: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on cost price if they are registered de minimis servicemen; or, (4) Use Tax on cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen must use the second method where they will use 50% of the entire bill to their service customers as the tax base. Both of the above methods provide that in no event may the tax base be less than the cost price of the tangible personal property transferred. Under these methods, servicemen may provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of the sales of service. Upon selling their product, they are required to collect the corresponding Service Use Tax from their customers.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See, 86 Ill. Adm. Code 140.101(f) enclosed. This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to sales of service. Servicemen that incur Service Occupation Tax collect the Service Use Tax from their customers. They remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in

graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self-assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. Those servicemen are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability. Those servicemen are also not liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis.

In the situation you have described, AAA may act as a primary serviceman subbing out work to another serviceman (printer) in a multi-service transaction. We cannot establish, without a great deal more specific information regarding the parties, what liability, if any, AAA or its customers might incur in these types of transactions. You may find the regulations governing multi-service transactions (see Section 140.145, enclosed) helpful in describing these types of transactions, however.

The above assumes that the signs remain tangible personal property after installation. If the signs were permanently affixed structurally as real estate, then there would be different tax consequences. Under Illinois law, a person who takes tangible personal property off the market and converts it into real estate is deemed a construction contractor and is the legal end-user of the tangible personal property. The construction contractor, as the user, incurs Illinois Use and local Retailers' Occupation Tax reimbursement liabilities when the tangible personal property that will be converted into real estate is purchased from registered Illinois suppliers. If such items were purchased from suppliers that did not collect the tax, the person who converts the tangible personal property into real estate would be required to self-assess and remit the Use Tax to this Department based upon the cost price of the property. How the franchised store is taxed on a sign depends upon the circumstances. You describe the sign as the outdoor AAA sign installed in front of the restaurant. If that sign is permanently affixed to realty, the contractor installing the sign owes Use Tax on its cost price of the sign. For information on construction contractors, see 86 Ill. Adm. Code 130.1940 and 130.2075, enclosed.

For your information and reference please find enclosed a copy of the Department's regulation governing "Sales of Containers, Wrapping and Packing Materials and Related Products," 86 Ill. Adm. Code 130.2070. As stated in subsection (b)(3) of the regulations, nonreusable tangible personal property sold to food and beverage vendors, including persons engaged in the business of operating restaurants, cafeterias or drive-ins, is a sale for resale when it is transferred to customers in the ordinary course of business as part of the sale of food or beverages and is used to deliver, package, or consume food or beverages, regardless of where consumption of the food or beverage occurs. By way of example, items sold for resale include, but are not limited to, paper and plastic cups, plates, baskets, boxes, sleeves, buckets or other containers, utensils, straws, placemats, napkins, doggie bags and wrapping or packaging materials that cannot be reused by the food or beverage vendor and which are transferred to customers as part of the sale of food or beverages.

It must be emphasized, however, that food vendors purchasing items used in conducting their business and which are not transferred to the customer fully incur Use Tax as the end users of the items sold. Such items include, but are not limited to, paper products, serving trays, serving dishes, utensils or condiment bottles. Items such as holding cabinets as described in your letter, uniforms worn by employees, soft serve freezers, misty freezers, "Blizzard" machines, "Blizzard" dispensers, "Blizzard" crusher, mix pump, freezer accessories, ice machine, fryers, bun toaster, chain broilers, shelving units, griddles, food preparation stands, food steamers, food warmer, walk-in cooler/freezer as described in your letter, drive thru communication system, seating, boosting oven, product thermometer, food pass thru systems, trash receptacles, serving counters, menu boards, smallwares packages as described in your letter, changing stations, and condiments bars result in Use Tax being incurred by the franchised stores.

We have enclosed a copy of 86 Ill. Adm. Code 130.330, which is the regulation for Manufacturing Machinery and Equipment. In some circumstances, bakery equipment can qualify for the Manufacturing Machinery and Equipment exemption from the Retailers' Occupation Tax. Section 130.330(a) of the Department's rules provides that "...the Retailers' Occupation Tax does not apply to sales of machinery and equipment used primarily in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease." Baking, whether done in a wholesale bakery or a grocery store, is the manufacturing or assembling of tangible personal property. Therefore, baking equipment that falls within the definition of equipment set forth in Section 2-45 of the Retailers' Occupation Tax Act (35 ILCS 120/2-45) can qualify for the exemption.

Please note, however, that equipment, including bakery equipment, which is used primarily by a food service establishment to prepare food for immediate consumption, does not qualify for the exemption. (See Sections 130.330(b)(7) and 130.330 (d)(4)(I), enclosed.) If establishments are in the business of selling both food for immediate consumption and bulk grocery sales, the machinery or equipment must be used primarily, over 50% of the time, in an exempt manner. Items such as the cake processing items, the flash freezer, and possibly the display unit freezer for AAA cakes may qualify as exempt manufacturing equipment if they are used primarily in an exempt manner.

Cake decorations that are transferred to the customer as a part of the product and the toys included with the kid's meals can be purchased for resale by the franchise store. The franchise store would be required to give you a Certificate of Resale for such items. See 86 Ill. Adm. Code 130.1405(b), enclosed.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.